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CHARLES ELMORE

IN THE

Supreme Court of the United States

TERM, A. D. 1951

NO. 689

JOHN NICHOLAS DONADUCY
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA. BRIEF IN SUPPORT OF PETITION

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Supreme Court of United States

TERM 1951
NO.

JOHN NICHOLAS DONADUCY
Petitioner and Appellant below

vs.

COMMONWEALTH OF PENNSYLVANIA
Respondent and Appellee below

PETITION FOR WRIT OF CERTIORARI OF THE SUPREME COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, John Nicholas Donaducy respectfully petitions this Honorable Court for a Writ of Certiorari to the Supreme Court of Pennsylvania.

STATEMENT OF MATTER INVOLVED

This matter involves the constitutionality of Section 524 of the Penal Code of Pennsylvania, more specifically referred to as the Act of June 24, 1939 P. L. 872, Section 524, 18 P. S. 4524. Said section is more commonly known as an obscenity statute. The Defendant was indicted, tried, convicted and sentenced

for an alleged violation of said section by publishing and distributing a newspaper of general circulation known as "The Town Crier".

During the trial of the case in the court of the first instance the Defendant properly demurred to the evidence of the prosecution and set forth as reasons therefore the constitutional issues here involved. (R. 17a-18a.) The Court overruled the demurrer. Thereafter the Defendant, Petitioner herein, presented his defense and the court charged the jury. In the charge the court, in giving a test to the jury as to the meaning of obscenity, permitted the jury to find the Defendant guilty if the article in question appealed particularly to those of depraved tastes and the curiosity of adolescents. (R. 34a.) The court refused to charge the jury as to the "clear and present danger doctrine" when Defendant specifically requested that the article in question and its language must have the effect of inciting to lewdness or of inciting to any sexual crime. (R. 37a). Defendant took a general exception. (R. 38a).

The lower court in opinion filed refused the Defendant a new trial and sentenced him without discussing or ruling on the constitutional question. (R. 3a, 41a-45a).

The Defendant appealed to the Superior Court of Pennsylvania and again raised the constitutional question. (R. 47a). The Superior Court disposed of the issue adverse to Defendant and as authority for its position quoted dicta of the United States Supreme Court from Chaplinski v. New Hampshire 315 U. S.

568, 62 S. Ct. 766, 86 L. Ed. 1031 and Winters v. New York 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840. (R. 50a).

The Defendant then petitioned for an appeal to the Supreme Court of Pennsylvania and again raised a constitutional question. (R. 54a-55a). The Supreme Court refused the appeal in a *Per Curiam* order. (R. 59a).

The matter involved in the case is whether a state legislature and a state court may restrict the freedom of press guaranteed by the Fourteenth Amendment by refusing to consider the "clear and present danger" doctrine and by using as a test of obscenity whether the article appeals particularly to those of depraved tastes and the curiosity of adolescents.

THIS COURT HAS JURISDICTION

Jurisdiction of this Honorable Court is predicated upon the repugnancy of a State Statute to the Fourteenth Amendment of the United States Constitution. Winters v. New York 333 U. S. 507, 68 S. Ct. 665 (1948); Judicial Code of June 25, 1948, c. 646, 62 Stat. 929, 28 USCA 1257(3). In this matter the highest appellate court of the State of Pennsylvania by a *Per Curiam* order affirmed the trial court and Superior Court and in so doing upheld the constitutionality of the State Statute. The full text of the opinion of the trial court (R. 41a-45a), the Superior Court of Pennsylvania (R. 48a-52a) and the Supreme Court of Pennsylvania (R. 53a) is set forth in the printed record.

This Court Has Jurisdiction

A previous decision of the Pennsylvania courts has discussed thoroughly the constitutionality of this State Statute and indicated its unconstitutionality. Commonwealth v. Gordon et al, 66 D & C 101 (1949). The Superior Court affirmance is in the name of Commonwealth, Appellant v. Feigenbaum et al. 166 Pa. Sup. Ct. 120 (1950). According to Reporter's Note in the Superior Court Report the Supreme Court affirmed *Per Curiem* March 30, 1950. The exact constitutional issues were properly raised in the trial court (R. 17a, 37a), in the Superior Court (R. 47a) and in the Supreme Court (R. 54a-58a) but each court in its opinion omitted consideration of the previous Pennsylvania approach.

Decisions of the United States Supreme Court have persistently upheld jurisdiction to consider the constitutionality of State Statutes limiting freedom of speech and press unless there is evidence in the statute or the trial of a clear and present danger. Schenck v. United States 249 U. S. 47 (1918); Whitney v. California 274 U. S. 357, 47 S. Ct. 641 (1927); Stromberg v. California 283 U. S. 359, 51 S. Ct. 532 (1931); DeJong v. Oregon 299 U. S. 353, 57 S. Ct. 255 (1937); Herndon v. Lowry 301 U. S. 242, 57 S. Ct. 732 (1937); Palko v. Connecticut 302 U. S. 319, 58 S. Ct. 149 (1937); Lovell v. Griffin 303 U. S. 444, 58 S. Ct. 666, (1938); Cantwell v. Connecticut 310 U. S. 296, 60 S. Ct. 900 (1940); Thornhill v. Alabama 310 U. S. 88, 60 S. Ct. 736 (1940); Bridges v. California 314 U. S. 252, 62 S. Ct. 190 (1941); Board of Education v. Barnette 319 U. S. 624 (1943); Martin v. Struthers 319 U. S. 141 (1943); Schneiderman v. United States

This Court Has Jurisdiction

320 U. S. 118, 63 S. Ct. 1333 (1943); United States v. Ballard 322 U. S. 78, 64 S. Ct. 882 (1944); Thomas v. Collins 323 U. S. 516, 65 S. Ct. 315 (1945); Pennekamp v. Florida 328 U. S. 331, 66 S. Ct. 1029 (1946); Musser v. Utah 333 U. S. 95, 68 S. Ct. 397 (1948).

Your Honorable Court has jurisdiction to consider the deprivation of due process of law when a trial judge in his charge changes the meaning of a criminal offense so that it becomes vague and uncertain. Winters v. New York 333 U. S. 507 (1948).

THE QUESTION PRESENTED

The question is whether the State of Pennsylvania, has the right, under the provisions of the Fourteenth Amendment to the Constitution of the United States, to pass a statute prohibiting the publication and distribution of a newspaper containing obscene matter in the absence of any evidence or statement in the statute, by the court, or for the jury, reasonably demonstrating cause for believing that a crime or misdemeanor has been committed or the clarity and imminence of the commission of a crime or misdemeanor as a result of a publication or distribution of the obscene matter.

The second question is whether the Defendant has been deprived of due process of law under the provisions of the Fourteenth Amendment if the trial court in its charge to the jury establishes as one test of obscenity whether the article in issue will appeal particularly to those of depraved tastes and the curiosity of adolescents.

REASONS FOR ALLOWANCE OF WRIT

A substantial federal question presents itself with respect to the scope of State Legislative authority upon the rights of freedom of press. There is dicta of this Honorable Court to the effect that obscenity is indictable just because it is obscenity. Winters v. New York 333 U. S. 507, 68 S. Ct. 665 (1948); Chaplinski v. New Hampshire 315 U. S. 568, 62 S. Ct. 766, 86 L. Ed. 1031; Near v. Minnesota 283 U. S. 697, 51 S. Ct. 625 (1931). But this Honorable Court has not passed upon the issue of what words or printed materials inflict injury by their mere utterance or publication or how such injury is inflicted. The nature of the question is more substantial in view of the Pennsylvania Decision of Commonwealth v. Gordan 66 D & C 101 (1949) in which the particular section now before this Honorable Court was treated as unconstitutional unless the state demonstrated that there was a clear and imminent danger of sexual misconduct or other unlawfulness as a result of publication. This approach was affirmed by the Superior Court of Pennsylvania in Commonwealth v. Feigenbaum 166 Pa. Sup. Ct. 120 (1950) wherein a "reasonable apprehension of danger to organized government" was required. In the case at bar the State Courts omitted any discussion of these principles or a determination of them and by so doing have deprived an individual of freedom of press by ommission. Your Honorable Court has considered closely related constitutional issues in the cases set forth above.

A second substantial federal question presents itself with respect to the scope of the state judicial

authority upon the rights of due process of law. The case of Winters v. New York 333 U. S. 507 (1948) presented a similar situation under the provisions of a related statute. The Pennsylvania courts have omitted a discussion or determination of the effect of the lower court's charge and by so doing have deprived an individual of due process of law. All appellant proceedings in the state have been exhausted.

WHEREFORE, your Petitioner prays for a decision determining whether such power may be exercised by the State Legislature and the State Courts.

Respectfully submitted,

S. Y. ROSSITER
ROBERT H. CHASE
Attorneys for Petitioner

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE OPINION BELOW

The opinion of the trial court is not reported but is printed in full in the record. (R. 41a-54a). The opinion of the Superior Court of Pennsylvania is reported in 167 Pa. Sup. Ct. 611 and in the record (R. 48a-52a). The opinion of the Supreme Court is not reported but is printed in the record (R. 59a).

STATEMENT OF THE CASE

There are no controverted issues of fact in this case. The Defendant admitted publishing and distributing the article alleged to be obscene. The jury found the article to be obscene. The constitutional issues now placed before this Honorable Court were squarely placed before the three Pennsylvania Courts for their consideration. At the trial of the factual issues the Commonwealth presented its evidence and rested. The defense then demurred to the evidence as providd by the Act of 1937 P. L. 1703 No. 1 (19 P. S. 481) and alleged, *inter alia*, that the Pennsylvania Obscenity Statute was repugnant to the Fourteenth Amendment in that it deprived the Defendant of freedom of the press. The demurrer was overruled and the trial court in so ruling sustained the constitutionality of the Pennsylvania Act. At the conclusion of the trial court's charge to the jury the defense again raised the issue by asking the court to charge the jury that it (the jury) must find as a fact,

before they could find the Defendant guilty, that the article in question must have the effect of inciting lewdness or of inciting to any sexual crime. This request was specifically refused.

In its charge to the jury the trial court furnished its definition of obscene literature. After charging that there was no standard test, the court propounded exemplary tests mostly in question form. One of those propounded as a basis upon which the Defendant could be found guilty was whether the article in question appealed particularly to those of depraved tastes and the curiosity of adolescents.

The constitutional issue was presented squarely to the Superior Court of Pennsylvania in the appellant's (Petitioner herein) statement of questions involved. The Superior Court decided the issue in favor of the constitutionality of the statute. It is here necessary to state as a fact of the case that the same Superior Court had ruled on the same statute in Commonwealth v. Feigenbaum 166 Pa. Sup. Ct. 120 only ten months before its decision in the present case and had done so in the following words at page 122:

> "The power of a state to abridge freedom of speech and assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered."

Said court did not, however, mention the Feigenbaum case in its decision on the present matter.

Petitioner then requested the Supreme Court of Pennsylvania to allow an appeal and presented the constitutional issue as one of his reasons. The Supreme Court disallowed the appeal without a decision and by so doing sustained the constitutionalityy of the Pennsylvania Statute.

Your Petitioner takes the position that he has been deprived of freedom of press because the Pennsylvania Obscenity Statute does not purport to prevent a reasonable apprehension of danger, the Commonwealth made no effort to present and did not present any evidence of a reasonable apprehension of danger, and the court refused to permit the jury to consider any reasonable apprehension of danger. It is further proposed that this Honorable Court has never decided that particular words inflict injury or danger by their very utterance or how such injury or danger is inflicted.

Your Petitioner also takes the position that even though there may be no standard tests for determining obscenity as charged by the trial court, that nevertheless he is deprived of due process of law by reason of vagueness and uncertainty if the statute proscribes publications which appeal particularly to those of depraved tastes and the curiosity of adolescents.

ARGUMENT

A.

The Fourteenth Amendment to the Federal Constitution prohibits any State from encroaching upon freedom of the press to the same extent that the First

Amendment prevents the Federal Congress from so doing. Pennekamp v. Florida 328 U. S. 331, Chaplinsky v. New Hampshire 315 U. S. 568, Thornhill v. Alabama 310 U. S. 88, Winters v. New York 333 U. S. 507.

The prohibition from encroaching upon freedom of the press occupies a preferred position under our law to such an extent that the courts, when considering whether legislation is violative, neutralize the presumption usually indulged in favor of constitutionality. Thomas v. Collins 323 U. S. 516, 530 (1945), Thornhill v. Alabama 310 U. S. 88 (1940), United States v. Carolene Products Co. 340 U. S. 144, 152 note 4 (1938), Spayd v. Ringing Rock Lodge 270 Pa. 67 (1921).

Under the now familiar "clear and present danger" rule the publisher or distributor of a writing, in this case a newspaper article, may be punished if the publication in question creates a clear and present danger that there will result from it some substantive evil which the legislature has a right to proscribe and punish. Scheneck v. United States 249 U. S. 47 (1918), Whitney v. California 247 U. S. 357 (1927). Further application of this rule is found in Herndon v. Lowry 301 U. S. 242 (1937) where Your Honorable Court stated:

> "The power of a State to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find justification in a reasonable apprehension of danger to

organized government. The judgment of the legislature is not unfettered."

In DeJonge v. Oregon 299 U. S. 353 (1937) it was held that the legislature could limit freedom of speech or press in order to protect against inciting to violence or crime.

There must be more than a "tendency" to crime or danger. Thus the opinion of the Supreme Court in Bridges v. California 314 U. S. 252 (1941) says:

> "In accordance with what we have said on the "clear and present danger" cases, *neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression.*" (under-scoring ours)

"The danger must not be remote or even probable; it must immediately imperil." Craig v. Harney 331 U. S. 364 (1947). Also, the proof must be clear, that is to say, "*a solidity of evidence should be required.*" Pennekamp v. Florida, *supra.* (under-scoring ours). Clear substantiation of these principles is found in the oral statement of Mr. Justice Rutledge when the "Hecate County" case, Doubleday & Co. Inc. v. People of New York 93 L. Ed. 37 was recently argued before the court:

> "It is up to the State to demonstrate that there was a danger, and until they demonstrate that, plus the clarity and imminence of the danger, the constitutional prohibition would seem to apply." (Quoted in 17 U. S. Law Week (Supreme Court Section 3118).

Argument

The argument of petitioner is based upon the correctness of the above approach and principles rather than the "tendency" theory cases decided prior to the pronouncement in the Bridges case, *supra*. Since that case there must be more than 'inherent tendency' or 'reasonable tendency'. The consequences must be serious and the imminence high and there should be a solidity of evidence. The Superior Court of Pennsylvania, when deciding the present case, not only overlooked this law as established by Your Court but also overlooked its own similar pronouncement in the Feigenbaum case, *supra*, that there must be a reasonable apprehension of danger to organized government in order to justify the identical statute here questioned. Instead of following its own law and the United States Supreme Court approach, the Superior Court chose to use *dicta* from Winters v. New York *supra*, and Chaplinsky v. New Hampshire, *supra*. If the *dicta* could be considered as substantive law, the effect of the Superior Court's ruling would be to invalidate the substantial approach as announced in the Feigenbaum case, *supra*, and the Bridges case, *supra*, in favor of a reinstatement of the mere 'tendency' theory, or, of an entirely new theory that certain words by their very utterance inflict injury by some mysterious manner. If this new theory is the law then it is not amiss to query, what words inflict injury by their very publication (not reading) and how is such injury inflicted?

Any conclusion that a theory of 'injury per se' is an absurd approach under constitutional law justifies the petitioner's position in his present request. It

is exactly that approach which has been applied by the Pennsylvania Courts. For in this case there is no statement of danger in the statute itself, no proof of danger by the Commonwealth at the trial, no explanation of danger by the trial court to the jury, and a refusal by the court to consider danger as a legal necessity.

B.

There is no definition in the Pennsylvania Statute indicating that the Legislature intended to punish a defendant if his publication appealed particularly to those of depraved tastes and the curiosity of adolescents. Yet, when the trial court so charged, it became as much a part of the statute as though the Legislature had added an amendment with that very wording. This fact alone invalidates the statute in question as applied to your petitioner. Winters v. New York, 333 U. S. 507.

Respectfully submitted,

S. Y. ROSSITER
ROBERT H. CHASE
Attorneys for Petitioner

[illegible]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

No. [illegible]

BERT TROY DORITY, LOMAN WILEY AND S. A. LANNING, JR.,

Appellants,

vs.

STATE OF NEW MEXICO, EX REL. JOHN H. BLISS, STATE ENGINEER

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATEMENT AS TO JURISDICTION

[illegible]
Counsel for Appellants.

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 5296

THE STATE OF NEW MEXICO, ON THE RELATION OF JOHN H. BLISS, STATE ENGINEER,

Plaintiff-Appellee

vs.

BERT TROY DORITY, LOMAN WILEY AND S. A. LANNING, JR.,

Defendants-Appellants

JURISDICTIONAL STATEMENT

The Appellants herein, Bert Troy Dority, Loman Wiley and S. A. Lanning, Jr., in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represent:

Statutory Provisions Sustaining Juridiction

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States is Sec. 1257, Title 28, U.S.C.A. (June 25, 1948, c. 646, 62 Stat. 929) providing to the extent here relevant as follows:

> "Final Judgments or decrees rendered by the highest Court of a state in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> "(2) By appeal where is drawn in question the validity of a statute of any state on the ground of its being

repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The remedy by appeal, if improvidently taken, will be regarded and acted upon as upon a petition for a Writ of Certiorari.

Sec. 2103, Title 28, U.S.C.A. (62 Stat. 962).

State Statute, the Validity of Which Is Involved

The statute of the State of New Mexico, the validity of which has been sustained by a final Judgment of the Supreme Court of New Mexico (the highest Court of law or equity in said state) as not being violative of or repugnant to the Constitution and laws of the United States is Chapter 131, Session Laws of New Mexico for the year 1931, approved March 17, 1931 (New Mexico Session Laws, 1931, p. 229) now constituting Sections 77-1101 to 77-1106 inclusive, New Mexico Statutes, 1941 compilation.

The pertinent provisions thereof are set forth in the opinion of the Supreme Court, and are as follows:

An act relating to underground waters, declaring certain underground waters to be public waters and relating to the beneficial appropriation thereof and repealing Article II of Chapter 151 of the New Mexico Statutes annotated 1929 compilation.

Section 1. The waters of underground streams, channels, artesian basins, reservoirs, or lakes, having reasonably ascertainable boundaries, are hereby declared to be public waters and to belong to the public and to be subject to appropriation for beneficial use.

Section 2. Beneficial use is the basis, the measure and the limit to the right to the use of the waters described in this act.

Section 3. Any person, firm or corporation desiring to appropriate for irrigation or industrial uses any of

the waters described in this act shall make application to the State Engineer in a form to be prescribed by him in which said applicant shall designate the particular underground stream, channel, artesian basin, reservoir or lake from which water is proposed to be appropriated, the beneficial use to which it is proposed to apply such water, the location of the proposed well, the name of the owner of the land on which such well will be located, the amount of water applied for, the use for which it is desired and if the proposed use is irrigation, the description of the land to be irrigated and the name of the owner thereof.

Upon the filing of such application the State Engineer shall cause to be published in a newspaper of general circulation in the county wherein the proposed well will be located, for at least once a week for three consecutive weeks, a notice of the filing of such application, and that objections to the granting thereof may be filed within ten days after the last publication of said notice.

After the expiration of the time for filing objections, if no such objections shall have been filed, the State Engineer shall, if he finds that there are in such underground stream, channel, artesian basin, reservoir or lake, unappropriated waters, grant the said application and issue a permit to the applicant to appropriate all or a part of the waters applied for subject to the rights of all prior appropriators from said source.

If objection or protest shall have been filed within the time in said notice specified the State Engineer shall set a date for a hearing on the application and the objections or protest thereto, and shall notify the application and the objectors or protestants thereof. Such hearing shall be held in the court house of the county in which the proposed well will be located. If after such hearing it shall appear that there are no unappropriated waters in the designated source, or that the proposed appropriation would impair existing water rights from such source, the application shall be denied.

Sec. 4. Existing water rights based upon application to beneficial use are hereby recognized. Noth-

ing herein contained is intended to impair the same or to disturb the priorities thereof.

Sec. 5. Any person, firm or corporation claiming to be the owner of a vested water right from any of the underground sources in this act described, by application of waters therefrom to beneficial use, may make and file in the office of the State Engineer a declaration in a form to be prescribed by the State Engineer setting forth the beneficial use to which said water has been applied, the date of first application to beneficial use, the continuity thereof, the location of the well and if such water has been used for irrigation purposes, the description of the land upon which such water has been so used and the name of the owner thereof. Such declaration shall be verified but if the declarant cannot verify the same of his own personal knowledge he may do so on information and belief. Such declarations so filed shall be recorded at length in the office of the State Engineer and may also be recorded in the office of the County Clerk of the county wherein the well therein described is located. Such records or copies thereof officially certified shall be prima facie evidence of the truth of their contents.

Sec. 6. Declarations heretofore filed in substantial compliance with Section 5 hereof shall be recognized as of the same force and effect as if filed after the taking effect of this act.

Sec. 7. The owner of a water right may change the location of his well or change the use of the water but only upon application to the State Engineer and upon showing that such change or changes will not impair existing rights and to be granted only after such advertisement and hearing as are prescribed in the case of original applications.

Sec. 8. When for a period of four years the owner of a water right in any of the waters described in this act shall have failed to apply the same to the use for which the right has vested, was appropriated or shall have been adjudicated, such water right shall be forfeited and the water so unused shall revert to the public and be subject to further appropriation.

Sec. 9. Upon the taking effect of this act the State Engineer shall by regulation establish the fees to be paid by applicants and declarants, which fees shall not exceed the reasonable cost of the service to be performed by the State Engineer and the applicant shall pay to the publisher the cost of the necessary advertisements, and before ordering any hearing the State Engineer shall require the applicant and protestant or protestants to each deposit with him a sum equal to the estimated cost of the hearing and after the decision the State Engineer shall refund to the prevailing party or parties the sum so deposited by him or them and shall refund to the proper person or persons any other monies expended.

Sec. 10. The decision of the State Engineer shall be final in all cases unless appeal be taken to the District Court within thirty days after his decision as provided by Section 151-173 of the 1929 New Mexico Statutes Annotated.

Sec. 11. Chapter 182 of the Session Laws of 1927, being Article II of Chapter 151 of the New Mexico Statutes Annotated, 1929 Compilation.

A violation of the provisions of the Act is a criminal offense against the laws of New Mexico (Sec. 77-1112, New Mexico Statutes, 1941 Compilation).

Date of Judgment and Application for Appeal

The date of the decision of the Supreme Court of New Mexico now sought to be reviewed was December 22, 1950. Said Judgment became final upon said date, absent the filing of a Petition for rehearing. The time for the taking of this appeal began to run on such date, namely December 22, 1950.

The date upon which application for appeal was presented and allowed was February 16, 1951.

Under the provisions of Sec. 350, Title 28 of the United States Code, as amended, the appellants may bring their

appeal within three months after the entry of the decree of the Supreme Court of the State of New Mexico (§ 2101, U. S. C. A. Title 28, 62 Stat. 961 as amended, 63 Stat. 104).

Statement of Nature of Case and Ruling Below

The State of New Mexico upon relation of the State Engineer instituted an action against each of the Appellants Dority, Wiley and Lanning, seeking to obtain an injunction against each of them, from allegedly unlawfully using underground water claimed under the provisions of Chapter 131, N. M. S. L. 1931, to be the public waters of the State of New Mexico. The source of the water being used by the Appellant Lanning was artesian waters, and that of Appellants Wiley and Dority, shallow underground water in the valley fill, overlying in part the artesian water supply designated by the State Engineer as the Roswell-Artesian basin. The lands of Appellants are in Chaves County, New Mexico, and are located within the exterior boundaries of an area declared by the State Engineer by proclamation, without a hearing, to be the Roswell-Artesian basin, and to be public waters of the type described in the 1931 Act. In this area, two strata of water supply irrigation, namely, the shallow ground water of the Pecos Valley fill and the artesian water contained in deeper underground strata.

It was alleged each of Appellants were irrigating certain lands owned by them illegally, and without having first obtained a permit so to do. The Appellants asserted in the trial Court and in the Supreme Court of New Mexico, their right to appropriate and place to beneficial use, and without waste, for irrigation of their lands, water obtained by wells upon their own lands and from water sources thereunder. The state denied Appellants had such right under the provisions of Chapter 131, N. M. S. L. 1931, supra.

The Appellants asserted by their Answer (Tr. 6-27-48)

to the Plaintiffs' Complaint in the trial Court below, as well as by appropriate Motion for Judgment (Tr. 490-496) and their requests for Findings of Fact and Conclusions of Law (Tr. 96-103). That said Act of 1931 violated the provisions of Section 1 of the Fourteenth Amendment to the Federal Constitution.

Specifically it was asserted in the Court below, and in the Supreme Court by Appellants, that they owned the land in question by mesne conveyances, based upon a chain of title from Patents from the United States, and that under the common law of England as construed by the Courts of the United States, the Civil Law of Spain and Mexico, which at one time was the law of a part of New Mexico lying west of the Rio Grande (but not that part of the state wherein Chaves County is located) and the customs of the people of New Mexico, as long as the memory of man runneth, the owner of the land was the owner of percolating waters under his land to the extent that he could apply such waters without waste, and subject to reasonable police regulations of the state, to beneficial use for the purpose of irrigating his lands. Appellants contended that such right was a valuable property right, and that by the action of the State in denying such right by the provisions of the laws of 1931, supra, their constitutional rights are infringed.

The trial Court sustained the state's case and entered a permanent injunction enjoining the Appellants from using water to irrigate their own lands from wells thereon, fully sustaining the 1931 Act.

In the Supreme Court of New Mexico, Appellants asserted the unconstitutionality of the Act as violating the Fourteenth Amendment to the Federal Constitution by the following Points which it relied upon for a reversal of the trial Court's action.

Point IV

The provisions of Section 1 of the Act of 1931 attempting to declare certain types of water having reasonably ascertainable boundaries are so vague, indefinite and uncertain as to violate due process amendment to the Federal Constitution and similar provisions of the Constitution of New Mexico, the Act providing no criterion or rule by which to determine when or how boundaries of a district are reasonably ascertainable.

Point V

Chapter 131 of the Session Laws of 1931 operates to deny to the defendants valuable property rights to apply underground waters under their lands to irrigation thereon, violates the Fourteenth Amendment to the Federal Constitution preventing the state from taking private property rights without just compensation.

Point VI

The provisions of Chapter 31 of the Session Laws of 1931 declaring underground waters of the type described to be public waters is contrary to the common law and to the civil law and to the custom and usage of the people of New Mexico, and is not a declaration of law, the law of New Mexico as it existed prior to the passage of the Act. The Act violates the Fourteenth Amendment of the Federal Constitution and Article 2, Section 18 of the Constitution of the state.

Point VII

The Act of 1931, if authorizing the Engineer to determine or decree the boundaries of an underground water basin without an adjudication suit or to deny the issuance of a

permit to take water from such public source so decreed or declared by him to be a public source, operates to deny these defendants unconstitutionally due process.

Point VIII

The provisions of the 1931 Act as amended and supplemented violate the Fourteenth Amendment to the Federal Constitution, and Sections 18 and 20 of Article 2 and Section 26 of Article 4 of the State Constitution in that thereunder

(a) Valuable rights have been denied to the defendants without due process of the law.

(b) The operation of said law by the State Engineer has been discriminatory, arbitrary and unlawful and has operated to deny these defendants equal protection of the laws and to result in special privileges being extended to others similarly situated.

(c) By said Act, no method of determining the boundaries of a district is set forth and defined, and no rules relating thereto have been provided by the Legislature or by regulations of the State Engineer, and no method in the determination of such boundaries is afforded or has been afforded which provides due process of law to these defendants.

(d) The action of the State Engineer in permitting hundreds of wells to be drilled in basins of the State since 1931 and to apply waters to beneficial use therein where no water district had been declared by him and in preventing these defendants from so doing by an unlawful and unauthorized proclamation declaring a purported water district operated by administrative interpretation and by the arbitrary administration of the Act to deny equal protection of the laws and to render the Act void.

This was the appropriate method of assigning error in the Supreme Court.

Rule 15, Supreme Court of New Mexico, adopted May 23, 1949.

The Supreme Court of New Mexico, deeming all constitutional questions properly raised, rejected each of the contentions of Appellants that the Act of 1931 supra, violated any of the provisions of the Fourteenth Amendment of the Federal Constitution. Furthermore, the Court held that in view of the fact that each of the patents upon which Appellants base their chain of title from the United States were issued and dated subsequent to the passage in 1877 of an Act of Congress known as the "Desert Land Act", that

(a) The Patents to Appellants conveyed no interest in or right to the use of any waters underlying said lands which could be used for irrigation and

(b) That the Desert Land Act reserved to the State of New Mexico and to the people thereof, all underground waters of the state to the exclusion of the right of Appellants to apply the same from their own lands to their own crops for beneficial use and that the title to all underground waters by said Act, was conveyed by Congress to the state, in trust for the people of the state, and

(c) This, notwithstanding the provisions of said Act, clearly demonstrated that said Act was intended to apply only to waters upon the surface of the land not navigable, and granted no public rights in underground percolating waters.

The Court further held that the provisions of Section 1. Chapter 131, Session Laws of New Mexico for the year 1931, attempting to declare certain types of underground waters having reasonably ascertainable boundaries, to be public waters and providing no other criterion or rule by which to determine when or how the boundaries of under-

ground waters are reasonably ascertainable, did not unconstitutionally violate the Fourteenth Amendment to the Federal Constitution providing that the state shall not deprive any person of life, liberty or property without due process of law, it being contended that said Act was so vague, indefinite, uncertain and speculative as to come within the constitutional provision and provided no standard or rule or criterion by which it is to be determined when or how a body of underground water has reasonably ascertainable boundaries. The violation of the Act constitutes a criminal offense against the laws of New Mexico. This point was raised in the trial court by the pleadings (Tr. 6-27-48 *et seq.*) and by appropriate requests for Findings of Fact and Conclusions of Law (Tr. 96-103). It was raised by the Supreme Court properly in the points hereinabove indicated, and the Supreme Court, deeming the point properly raised, passed on the point as is disclosed by the exhibits from the opinion herein contained, and the opinion hereto attached.

Furthermore, the question was raised in the trial Court by the pleadings (Tr. 6-27-48 *et seq.*) and by appropriate requests for Findings of Fact and Conclusions of Law (Tr. 96-103) as to whether or not the Laws of 1931, supra, as undisputedly administered by the State Engineer of the State of New Mexico, do not unconstitutionally deny to Appellants due process of law as guaranteed by the Fourteenth Amendment to the Constitution, and deprive the Appellants of equal protection of the laws as similarly guaranteed by the Fourteenth Amendment.

The question having been deemed properly raised in the Supreme Court by the Supreme Court of the State of New Mexico, was passed upon by the Court adversely to Appellants and the constitutionality of said Act sustained on all grounds.

The foregoing, we believe, constitutes a fair statement of the nature of the case and the rulings below.

The Supreme Court specifically decided the constitutional question urged, adversely to Appellants, and fully sustained the 1931 Act supra. This is indicated by the following excerpts from the opinion of the Court:

> "The principal question raised is whether the Act of 1931, which we have quoted, that declared the ownership of the waters in question to be in the public, violates the 14th Amendment to the Constitution of the United States . . . in that it authorizes the state to deprive its citizens and others of their property without due process of law, and denies them the equal protection of the laws. . . ."
>
> "Without going into unnecessary detail and without referring to the many cases cited by the parties to this suit, we state that the patents from the United States to public lands issued after 1866, and particularly those issued after the Desert Land Act of 1877, conveyed no interest in, or right to, the use of surface or underlying water with which lands could be irrigated, except such portions thereof as were used to reclaim the particular land applied for under the Act."
>
> ". . . the waters involved in this suit were reserved for the people of New Mexico, to be disposed of under its laws and the decisions of its courts, by an act of the United States Congress of 1877. This act was known as the Desert Land Act. . . ."
>
> "We conclude that all water that may be used for irrigation was reserved by the Desert Land Act to be used beneficially by the public as provided by the laws of the arid states. No interest in such waters was conveyed by a United States Patent."
>
> "We hold that under the Federal law and that of New Mexico the waters described in Sec. 1 of the Act of 1931 are subject to appropriation under that Act."

"Defendants attack the statute of 1931 as being vague and uncertain to the extent that it does not meet the requirements of the due process clause of the Federal and State Constitutions. It is asserted that the standard by which the public character of underground water is determined, i.e. those 'having reasonably ascertainable boundaries' is not sufficiently certain to meet this test of constitutionality when applied to newly developed underground sources."

"We have concluded that the water involved was reserved, on or before the date the Desert Land Act became effective to the State of New Mexico as trustee for the public, and subject to its use by the public at any time thereafter, by authority of the State statutes, even though passed after the date of the patents to the lands of the defendants. The patents to defendants' lands carried no right to the use of water, except as to that actually applied to the reclaiming of land under the Desert Land Act and not thereafter abandoned. All other waters belong to the state as trustee for the public."

Applicant appends hereto as "Exhibit A", a true copy of the opinion of the Supreme Court of New Mexico, sought to be reversed as required by Rule 12 of the Supreme Court.

Substantiality of Questions Involved

The Appellants respectfully represent to the Court that the questions involved in this appeal to the Supreme Court of the United States are of a substantial nature.

It is well settled that an appeal to the Supreme Court of the United States will not be dismissed for want of a substantial Federal question unless the contentions of the Appellants are "clearly not debatable and utterly lacking in merit".

Hamilton v. *Regents of University,* 293 U. S. 245, 258.

The Federal statute, supra, specifically provides that final judgments or decrees rendered by the highest Court of a state in which a decision could be had may be reviewed by the Supreme Court by appeal.

> "Where is drawn in question the validity of a statute of any state on the grounds of its being repugnant to the Constitution, treaties and laws of the United States, and the decision is in favor of its validity".

It will be observed from the Points raised by Appellants in the Supreme Court attacking the constitutionality of the 1931 Act supra, and from the excerpts of the opinion of the Court hereinabove quoted and the opinion hereto attached as "Exhibit A", that substantial questions involving an application of Federal law, and as to the constitutionality of the 1931 Act supra, are here raised and involved.

Furthermore, it is believed and asserted that the question of constitutional law, raised and presented by the New Mexico statutes of 1931, and here urged as error, has never been passed upon by the Supreme Court of the United States or any of the Circuit Courts of the United States. For this reason, a substantial Federal question is involved.

Senn v. *Tile Layers Union,* 301 U. S. 468, 476.

Neither is it believed that any Court in the United States, except the New Mexico Supreme Court in this case, has ever held the "Desert Land Act" of 1877 constituted a Federal grant of underground waters to the state, so as to permit the state to effectively prevent the application thereof to the beneficial use of irrigation, by Patentees of public lands holding Patents, without reservation, to their lands from the United States. Upon this basis the Court in the present case has effectively denied that the Appellants have any "property rights" to be protected by the Fourteenth Amendment to the Federal Constitution. That the right

to appropriate underground water from under one's own land is a valuable property right seems elementary.

St. Germain Irrigation Co. v. *Hawthorn Ditch Co.*, (S.D.) 143 N.W. 124

This question presents a grave question of constitutional law under the Fourteenth Amendment to the Federal Constitution.

Furthermore, it is not believed that any Court in the United States, except the Supreme Court of New Mexico in this case, has ever applied the provisions of the Desert Land Act of Congress to underground percolating waters or underground waters of any type, nor has any Court held as the New Mexico Supreme Court has now held, that said Act constituted a grant to the state in trust for the citizens of the state, the ownership of the underground waters therein. This presents a grave Federal question of vital importance to the people.

Furthermore, it appears that the decision of the Supreme Court of New Mexico holding Section 1 of the Act of 1931 is sufficiently definite to meet the requirements of certainty imposed by the Fourteenth Amendment to the Federal Constitution, is in direct conflict with prior decisions of the Federal Courts.

U. S. v. *Brewer*, 139 U. S. 212, 35 L. Ed. 190

U. S. v. *Cohen Grocery Co.*, 41 Sup. Ct. Rep. 298, 14 A. L. R. 1045

Conley v. *General Construction Co.*, 70 L. Ed. 322.

Particularly in view of the fact that a violation of the 1931 Act supra is made a crime against the laws of New Mexico.

Sec. 77-1112, New Mexico Statutes, 1941 Compilation

Furthermore, it is believed and urged that the Court erred in holding the provisions of Chapter 131, Session Laws of

1931 supra, as undisputedly shown by the evidence introduced in this case to be administered by the State Engineer does not unconstitutionally deny to Appellants due process of law and equal protection of the laws as guaranteed by the Fourteenth Amendment to the Federal Constitution, for that the undisputed evidence in the case shows from the testimony of the State Engineer himself (Tr. 135-175) (240-264) that he has assumed a right thereunder to determine arbitrarily the boundaries of an underground area of public waters without notice or hearing of any kind to the owners of the overlying lands and upon such arbitrary determination has opened or closed said areas at will for the drilling and development of wells and for the taking of underground water by the irrigation of lands therein without hearing or notice to the owners of the land and assumed the right absolutely to prohibit the drilling of wells within the exterior boundaries of the water areas so arbitrarily defined by him, and has sought to control absolutely the development and exploration of such underground waters declared by him to be public waters while at the same time permitting other bodies of underground waters of the type defined in the 1931 Act as public waters to be developed and exploited for irrigation without regulation or supervision of any kind thus by administrative interpretation and by arbitrarily administering the Act, denying to Appellants due process of law and equal protection of the laws, thus to render said Act unconstitutional and void. That an Act of the Legislature may be held void because of the arbitrary method or manner of its enforcement by the state officer purporting to enforce the same in behalf of the state, presents a question under the Fourteenth Amendment to the Federal Constitution, cannot be denied.

12 Am. Jur. 133, Section 471

12 Am. Jur. 137, Section 475

12 Am. Jur. 257, Section 566

Home Telephone and Telegraph Company v. *City of Los Angeles,* 227 U. S. 278, 33 Supt. Ct. Rpr. 312, 57 L. Ed. 510

It is further urged that a decision of the Supreme Court upon each of the questions here involved, is a matter of vital importance and concern, not only to the arid states of the west, but to every state in the nation. Such a decision will remove all uncertainty which may now exist with reference to the ownership by states of the underground water resources of those states, and enable every patentee of lands, and their successors in title, to be fully advised as to the extent of his right to apply underground waters in the water below his lands, to beneficial use by bringing it to the surface.

Authorities Sustaining the Jurisdiction of the Supreme Court of the United States to Review By Appeal the Judgment Rendered Herein

It is respectfully urged that the following cases sustain the jurisdiction of the Supreme Court to review the appeal herein.

1. The appeal is timely taken.

§ 2101 U.S.C.A., Title 28 (62 Stat. 961, as amended, 63 Stat. 104)

Puget Sound Power Co. v. *King County,* 44 S. Ct. 261, 264 U. S. 22, 68 L. Ed. 541

2. Jurisdiction to entertain an appeal from the decision of a State Court on the ground that a state statute violates the "due process" clause of the Fourteenth Amendment to the Federal Constitution.

Winters v. *People,* 68 S. Ct. 665, 92 L. Ed. 480, 333 U. S. 507

Miller v. *Schoene*, 48 S. Ct. 246, 276 U. S. 272
Northern Pacific Ry. v. *Washington*, 45 S. Ct. 412, 268 U. S. 39
Kansas City Southern Ry. v. *Road District*, 266 U. S. 379

3. Jurisdiction to entertain an appeal from a State Court's decision on the ground that the state statute violates the "equal protection" clause of the Fourteenth Amendment to the Federal Constitution.

Smith v. *Cahoon*, 283 U. S. 553
Aero Mayflower Tea Co. v. *Georgia*, 295 U. S. 285
Hartford Steam Boiler Co. v. *Harrison*, 301 U. S. 459
Senn v. *Tile Layers Union*, 301 U. S. 468, 476

4. Every question arising under the Federal Constitution may, if properly raised in a state Court, come ultimately to the Supreme Court of the United States for review.

Hague v. *C.I.O.*, 59 S. Ct. 954, 307 U. S. 496

Therefore the Appellants respectfully submit that the Supreme Court of the United States has jurisdiction to entertain an appeal herein.

CASWELL S. NEAL,
Attorney for Appellants,
Carlsbad, New Mexico.

APPENDIX

Copy Filed: Dec. 22, 1950

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 5296

THE STATE OF NEW MEXICO, On the Relation of JOHN H. BLISS, State Engineer, PLAINTIFF-APPELLEE,

vs.

BERT TROY DORITY, LOMAN WILEY, and S. A. LANNING, JR., DEFENDANTS-APPELLANTS

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY

ANDERSON, Judge

JOSEPH O. WALTON, *Special Asst. Attorney General*
Roswell, New Mexico
MESSRS. ATWOOD, MALONE & CAMPBELL,
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Attorneys for Appellee
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Carlsbad, New Mexico
Attorney for Appellants

OPINION

BRICE, Chief Justice.

The State of New Mexico, upon relation of its State Engineer John H. Bliss, brought separate suits against Bert Troy Dority, Loman Wiley and S. A. Lanning, Jr., the purpose of which was to enjoin the respective defendants from unlawfully using for irrigating lands, waters drawn

from what is known as the Roswell Artesian Basin, and the valley fill above it, which plaintiff asserts under Ch. 131 N.M. L. 1931, are subject to appropriation as provided therein.

These three suits were consolidated in the district court for all purposes and are here on appeal from a decree of the district court enjoining each of the defendants from using unappropriated water for the irrigation of land, in violation of the New Mexico statutes.

Defendants' lands are situated in Chaves County, New Mexico, and are located within the external boundaries of two underground water sources, one of which is an artesian basin lying between confining strata, the waters of which are commonly referred to as artesian waters and the other, plaintiff asserts, is an underground reservoir or lake in the valley fill overlying such artesian basin, the waters of which are commonly referred to as shallow ground water. About 45,000 acres are irrigated from shallow ground water and 55,000 acres from artesian water.

Each of the defendants, Lanning and Dority, is the owner of a permit authorizing him to use water for irrigating a portion of his lands; but the plaintiff asserts that the defendant Dority is irrigating 96.7 acres of land illegally, in that he has not been granted the right to so use the water; that the defendant Wiley was in like manner illegally using water to irrigate 48.7 acres of land; and the defendant Lanning was illegally using water to irrigate 120 acres. The defendants admit that they have been using, and will continue to use, the water without a permit unless enjoined from so doing. They deny that their use of it is in violation of law. The principal contention is that the New Mexico statutes providing for the appropriation of sub-surface water is unconstitutional upon several grounds stated.

The statutes of New Mexico declaring that the artesian and shallow ground water from which defendants obtained the water to irrigate their land belongs to the public and providing for their appropriation for beneficial use, are as follows:

> "The waters of underground streams, channels, artesian basins, reservoirs, or lakes, having reasonably

ascertainable boundaries, are hereby declared to be public waters and to belong to the public and to be subject to appropriation for beneficial use." Sec. 77-1101 N. M. Sts. 1941.

"Beneficial use is the basis, the measure and the limit to the right to the use of the waters described in this act." Sec. 77-1102 N. M. Sts. 1941.

"Any person, firm or corporation desiring to appropriate for irrigation or industrial uses any of the waters described in this act shall make application to the state engineer in a form to be prescribed by him in which said applicant shall designate the particular underground stream, channel, artesian basin, reservoir or lake from which water is proposed to be appropriated, the beneficial use to which it is proposed to apply such water, the location of the proposed well, the name of the owner of the land on which such well will be located, the amount of water applied for, the use for which it is desired and if the proposed use is irrigation, the description of the land to be irrigated and the name of the owner thereof. (Then follows a provision for the publication of notice of any objections to granting the permit, a provision that such application should be granted if there are any waters subject to appropriation, and the manner of hearing protests on such application, if any.)" Sec. 77-1103 N. M. Sts. 1941.

"Existing water rights based upon application to beneficial use are hereby recognized. Nothing herein contained is intended to impair the same or to disturb the priorities thereof." Sec. 77-1104 N. M. Sts. 1941.

"Any person, firm or corporation claiming to be the owner of a vested water right from any of the underground sources in this act described, by application of waters therefrom to beneficial use, may make and file in the office of the state engineer a declaration in a form to be prescribed by the state engineer setting forth the beneficial use to which said water has been applied, the date of first application to beneficial use, the continuity thereof, the location of the well and if such water has been used for irrigation purposes, the

description of the land upon which such water has been so used and the name of the owner thereof. (Then follows provision for verification of the declaration, and the recording thereof.)" Sec. 77-1105 N. M. Sts. 1941.

"Declarations heretofore filed in substantial compliance with section 5 (Sec. 77-1105) hereof shall be recognized as of the same force and effect as if filed after the taking effect of this act." (Sec. 77-1106 N. M. Sts. 1941.)

"The decision of the state engineer shall be final in all cases unless appeal be taken to the district court within thirty (30) days after his decision as provided by section 151-173 of the 1929 New Mexico Statutes Annotated (Sec. 77-601)." Sec. 77-1110 N. M. Sts. 1941.

"The state engineer is hereby given the power and it is made his duty to formulate rules and regulations for the purpose of carrying out the provisions of act, which rules and regulations shall be printed and made available for distribution to all applicants." Sec. 77-1111 N. M. Sts. 1941.

"Any person using or appropriating water without a permit, contrary to the provisions of section 1 of chapter 70, of the New Mexico Session Laws of 1943, designated as section 77-1103 of the New Mexico statutes, 1941, Annotated; or who changes the location of his well or use of the water except as provided and permitted by section 77-1107 of said New Mexico Statutes, 1941, Annotated; or who appropriates to his own use without a permit from the state engineer forfeited water or water rights under the provisions of section 77-1108 of said New Mexico Statutes, 1941, Annotated, shall be guilty of a misdemeanor and, on conviction thereof in any court of competent jurisdiction, shall be punished, etc." (Laws 1943, Ch. 70, Sec. 2; 1947 Ch. 21, Sec. 1.) Sec. 77-1112 N. M. Sts. 1941.

The appellants' first contention is stated as follows:

"The State Engineer of New Mexico has no right to maintain these actions by way of injunction against

these defendants, such right not having been conferred upon him by law, and the State Engineer has not been given authority by law to maintain such an action in the name of the state upon the relation of the State Engineer."

These suits are styled "The State of New Mexico on the Relation of John H. Bliss, State Engineer" as plaintiff. The contention is that this official was not authorized by any law to bring these suits.

The answer is that the suits were not brought by the State Engineer, but by the Attorney General of the state acting through his assistant, and by special counsel employed in the cases.

If there is an error in that part of the title reading, "On the Relation of John H. Bliss, State Engineer" then it will be treated as surplusage.

The public waters of this state are owned by the state as trustee for the people (Murphy v. Kerr, 296 Fed. 536); and it is authorized to institute suits to protect the public waters against unlawful use, or to bring any other action whether authorized by any particular statute, if required by its pecuniary interests or for the general public welfare, 49 A. J. "States, Territories & Dependencies" Sec. 80. The Attorney General is given specific authority "to prosecute and defend all causes in the Supreme Court in which the state is a party or interested; to prosecute and defend in any other court or tribunal all actions and proceedings, civil or criminal, in which the state may be a party or interested, when in his judgment the interest of the state requires such action, or when requested to do so by the Governor." Sec. 3-302 N. M. Sts. 1941.

The State Engineer has no personal interest in this suit, and it is brought by the Attorney General in behalf of the state alone, as its pleadings indicate. The words "on the relation of John H. Bliss, State Engineer" will be treated as surplusage if necessary. People ex rel. Clark v. Milk Producers Assn. (Calif. App.) 212 P. 957; People ex rel. Warfield v. Sutter Street Ry. Co., 117 Calif. 604,

49 P. 736. The district court recognized the State of New Mexico as the party plaintiff, entitled to prosecute these suits, and so we conclude.

Appellants' Point II is as follows:

> "State Engineer has no jurisdiction over underground waters under 1907 water code and no authority has been granted him to declare or define underground water basin or regulate issuance of permits in such district until such time as water area has been defined and determined by adjudication suit brought by state engineer under statutes relating to adjudication of water rights."

We will assume for the purposes of this case that the 1907 water code (Ch. 49 N. M. L. 1907 and amendments) has no application to underground waters, but see El Paso & R. I. Ry. Co., 36 N. M. 94, 8 P. 2d 1064. The Act of 1931 provides that "The waters of underground streams, channels, artesian basins, reservoirs or lakes, having *reasonably ascertainably boundaries,* are hereby declared to be public waters and to belong to the public, etc." It is these waters over which the State Engineer is given jurisdiction. There is no provision in the law that requires an adjudication in court to define or determine the area or boundaries of any of the described waters before the statutory jurisdiction of the State Engineer becomes effective.

It has been assumed by the State Engineer that he had jurisdiction to determine the outer boundaries of such bodies of water since the passage of the 1931 act. This jurisdiction is implicit in the act. We recognized it in the Peters case, infra; and we stated in Yeo v. Tweedy, 34 N. M. 611, 286 P. 970, construing the same provisions in a prior act:

> "* * * Whether the state engineer shall have jurisdiction over such waters is, however, a matter for

legislative determination. He will have such jurisdiction as the statute gives him. Valderwork v. Hewes and Dean, supra. Before he can assume jurisdiction over underground bodies he must find that they have boundaries reasonably ascertained by scientific investigations or by surface indications."

The jurisdiction of the engineer to determine the boundaries of such waters has been recognized by a recent act of the legislature.

> "It shall be unlawful for any person, firm or corporation to drill or to begin the drilling of a well for water from an underground stream, channel, artesian basin, reservoir or lake (hereinafter referred to as 'underground source') the boundaries of which have been determined and proclaimed by the State Engineer of New Mexico to be reasonably ascertainable, without a valid, existing license for the drilling of such wells issued by the State Engineer of New Mexico in accordance with the provisions of this act, and the rules and regulations promulgated by him in pursuance hereof." Ch. 178, Sec. 1, N. M. L. 1949.

A legislative act which requires an officer to determine facts upon which his jurisdiction depends, does not grant either legislative (Panama Refining Co. v. Ryan et al, 293 U. S. 388, 79 L. Ed. 446) or judicial authority to such officer (Mutual Film Corp. v. Industrial Comm., 236 U. S. 230, 59 L. Ed. 552; Rainey, Supt. of Banks, v. Michel, 6 Calif., 2d 259, 57 P. 2d 932, 105 A. L. R. 148. And see 11 A. J. "Constitutional Law" Secs. 235 et seq.

The State Engineer has the jurisdiction and authority to determine the boundaries of any of the underground waters declared to be public waters, and no judicial determination is necessary to the jurisdiction given him by the laws in question.

No right to the use of water from such sources was obtained by its use by defendants in violation of law, nor

can it be. The statutory manner of securing such rights is exclusive. Pecos Valley Artesian Cons. District v. Peters, 50 N. M. 165, 173 P. 2d 490. We so held as to the irrigation law of 1907 in Harkey v. Smith, 31 N. M. 521, 247 P. 550. The same legal principles apply here.

The principal question raised is whether the Act of 1931, which we have quoted, that declared the ownership of the waters in question to be in the public, violates the 14th Amendment to the Constitution of the United States and Sec. 18 of Art. 2 of the Constitution of New Mexico, in that it authorizes the state to deprive its citizens and others of their property without due process of law, and denies them the equal protection of the laws; and violates Sec. 20 of Art. 2 of the Constitution of New Mexico in that it authorizes the taking of private property for public use without just compensation.

The whole argument is based on the assumption that the water described in Sec. 1 of the Act of 1931 belongs to the owners of the overlying land. Each of the defendants claims that the underground water under his land is his property acquired through mesne conveyances from the United States, beginning with the patent from the Government and that such patent and mesne conveyances transferred to him the water underlying the land conveyed. In other words, that the common law, or at least the law of correlative rights in such waters, is the law of this state.

Without going into unnecessary detail and without referring to the many cases cited by the parties to this suit, we state that the patents from the United States to public lands issued after 1866, and particularly those issued after the Desert Land Act of 1877, conveyed no interest in, or right to, the use of surface or underlying water with which lands could be irrigated, except such portions thereof as were used to reclaim the particular land applied for under

the Act. The substance of the contention of each of the appellants is that he has a vested interest in the title to the water under his lands, to the center of the earth, of which he cannot be deprived by any legislative act.

This question was settled by this court in Yeo v. Tweedy, supra. It was held in that case that the title to the water described in Sec. 1 of the 1931 Act belonged to the public and was subject to appropriation for beneficial uses. We do not deem it necessary to go into this question extensively again, but because of decisions of this and other courts on the question since Yeo v. Tweedy, which was decided April 16, 1930, we will review them.

It was stated in Yeo v. Tweedy that Sec. 1 of Ch. 182 N. M. L. 1927, almost identical with the 1931 Act, had always been the law in this jurisdiction. Whether this is correct or not, it is of little importance, as the waters involved in this suit were reserved for the people of New Mexico, to be disposed of under its laws and the decision of its courts, by an act of the United States Congress of 1877. This act was known as the Desert Land Act and is as follows:

> "Sec. 321. It shall be lawful for any citizen of the United States, or any person of requisite age 'who may be entitled to become a citizen, and who has filed his declaration to become such' and upon payment of 25 cents per acre—to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same, within the period of three years thereafter; PROVIDED, HOWEVER, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of

irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said one-half section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of $1 per acre for a tract of land not exceeding three hundred and twenty acres to any one person, a patent for the same shall be issued to him; PROVIDED, that no person shall be permitted to enter more than one tract of land and not to exceed three hundred and twenty acres which shall be in compact form." (Mar. 3, 1877, c. 107, Sec. 1, 19 Stat. 377; Mar. 3, 1891, c. 561, Sec. 2, 26 Stat. 1096).

We construed this Act as it applied to surface water, in State v. Red River Valley Co., 51 N. M. 207, 182 P. 2d. 421, in our opinions on motion for rehearing and second motion for rehearing. The title to underground waters was not involved in that case but the reasoning applies here, as will be shown later in this opinion.

> "In neither case was the 'ownership' of water involved. So far as I am informed no court has ever held that lands granted by a United States patent carried title to running water passing through them. In those states in which the common law of riparian rights is in force, the patents of the United States conveyed to the grantee 'no property in the water itself, but a simple usufruct while it passes along.' United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136.

Likewise patents to land in the arid states have never been held to convey as property the running water on the granted land.

"But we need not trouble ourselves about the question of the ownership of water in running streams on public lands. Appellee's patent was dated April 20, 1877, after the Desert Land Act (Act of March 3, 1877, 19 Stat. 377, 43 U. S. C. A. Sec. 321 et seq.) had become effective. Assuming that the appellee's title is from the United States, unaffected by any previous Mexican grant, the title to the flowing water was not included in the conveyance; for by the Desert Land Act, ' * * * * if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately.' Ickes, Sec'y v. Fox, supra. Appellee obtained no title to water or to its use by virtue of the patent from the United States."

* * * * * * *

"Regarding the acts of Congress recognizing the right to the use of water in streams and lakes on public lands, it was further stated in California-Oregon Power Co. v. Beaver, etc. Co., supra:

"The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid land states, as the test and measure of private rights and to the nonnavigable waters on the public domain. * * * " 'If the acts of 1866 and 1870 did not constitute an entire abandonment of the common-law rule of running waters in so far as the public lands and subsequent grantees thereof were concerned, they foreshadowed the more positive declarations of the Desert Land Act of 1877, which it is contended did bring about that result.' * * * " ' * * * The fair construction of the provision now under review (Act of 1877) is that Congress intended to establish the rule that for the future the land should be patented separately; and that

all nonnavigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. * * *

" 'Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since "Congress cannot enforce either rule upon any state," * * * the full power of choice must remain with the state.'

* * * * * * *

"I do not doubt but that the water of nonnavigable streams had been severed from the public domain of the arid west long before the passage of the Desert Land Act of 1877, by prior acts of Congress as well as by the government's recognition of the customs, laws and court decisions of the western states in relation thereto as intimated in the Ickes Case, and in California-Oregon Co. v. Beaver, Etc. Co., supra. If appellee has any fishing rights in the Conches Lake, it is only by virtue of the statute of 1876 adopting the common law as the rule or practice and decision in this jurisdiction."

The case of California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U. S. 142, 79 L. Ed. 1356, from the State of Oregon was decided in 1935, five years after our decision in the Yeo case. The Supreme Court said: "The sole claim is based upon the common law rights of a riparian proprietor which petitioner said was attached to the land when the patent was issued to its first predecessor in title."

This is the exact claim here, except as to the nature of the water involved. Portions of the opinions in this case were quoted in the Red River Company case, and like that case it involved running water on the surface of the earth, but we call specific attention to the Desert Land Act of 1877 which, among other things provided for the disposition of unappropriated water as follows:

> "* * * and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

The question here is as to the intention of Congress in using the following language: "* * * together with the water of all lakes, rivers, *and other sources of water supply* * * *" Does this include the water dedicated to public use by the Act of 1931? It was the intention of Congress in using the words "other sources of water supply" to cover all water that could be used and appropriated for beneficial use under the laws of the state where the land is located.

As we feel that the Power Company case is decisive here, we quote a considerable portion of that opinion, as follows:

> "The question with which we are here primarily concerned is whether—in the light of pertinent history, of the conditions which existed in the arid and semi-arid land states, of the practice and attitude of the federal government, and of the congressional legislation prior to 1885—the homestead patent in question carried with it as part of the granted estate the common-law rights which attach to riparian proprietorship. If the answer be in the negative, it will be unnecessary to consider the second question decided by the court below.

"For many years prior to the passage of the Act of July 26, 1866, chap. 262, Sec. 9, 14 Stat. at L. 251, 253, U. S. C. title 43, Sec. 661, the right to the use of waters for mining and other beneficial purposes in California and the arid region generally was fixed and regulated by local rules and customs. The first appropriator of water for a beneficial use was uniformly recognized as having the better right to the extent of his actual use. The common law with respect to riparian rights was not considered applicable, or, if so, only to a limited degree. Water was carried by means of ditches and flumes great distances for consumption by those engaged in mining and agriculture. * * * The rule generally recognized throughout the states and territories of the arid region was that the acquisition of water by prior appropriation for a beneficial use was entitled to protection; and the rule applied whether the water was diverted for manufacturing, irrigation, or mining purposes. The rule was evidenced not alone by legislation and judicial decision, but by local and customary law and usage as well. * * *

"This general policy was approved by the silent acquiescence of the federal government, until it received formal confirmation at the hands of Congress by the Act of 1866, supra. Section 9 of that act provides:

" 'That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decision of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid is hereby acknowledged and confirmed: * * *'

"This provision was 'rather a voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment of a new one.' * * * And in order to make it clear that the grantees of the United States would take

their lands charged with the existing servitude, the Act of July 9, 1870, chap. 235, Sec. 17, 16 Stat. at L. 217, 218, U.S.C. title 30 Sec. 52, amending the Act of 1866, provided that— '. . . all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory.'

"The effect of these acts is not limited to rights acquired before 1866. *They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use,* as recognized by local *rules and customs, and the legislation and judicial decisions of* the arid-land States, as the test and measure of private rights in and to the non-navigable waters on the public domain. * * *

"*If the acts of 1866 and 1870 did not constitute an entire abandonment of the common-law rule of running waters* in so far as the public lands and subsequent grantees thereof were concerned, they foreshadowed the more positive declarations of the Desert Land Act of 1877, which it is contended did bring about that result. That act allows the entry and reclamation of desert lands within the states of California, Oregon and Nevada (to which Colorado was later added), and the then territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota, with a provision to the effect that the right to the use of waters by the claimant shall depend upon bona fide prior appropriations, not to exceed the amount of waters actually appropriated and necessarily used for the purpose of irrigation and reclamation. Then follows the clause of the proviso with which we are here concerned:

"'. . . all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain

and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.' Chap. 107, 19 Stat. at L. 377, U. S. C. title 43, Sec. 321. * * *

"That body (the Congress) thoroughly understood that an enforcement of the common-law rule, by greatly retarding if not forbidding the diversion of waters from their accustomed channels, would disastrously affect the policy of dividing the public domain into small holdings and effecting their distribution among innumerable settlers. In respect of the area embraced by the desert-land states, with the exception of a comparatively narrow strip along the Pacific seaboard, it had become evident to Congress, as it had to the inhabitants, that the future growth and well-being of the entire region depended upon a complete adherence to the rule of appropriation for a beneficial use as the exclusive criterion of the right to the use of water. * * * Necessarily, that involved the complete subordination of the common-law doctrine of riparian rights to that of appropriation. And this substitution of the rule of appropriation for that of the common law was to have momentous consequences. It became the determining factor in the long struggle to expunge from our vocabulary the legend 'Great American Desert,' which was spread in large letters across the face of the old maps of the far west.

"In the light of the foregoing considerations, the Desert Land Act was passed, and in their light it must now be construed. By its terms, not only all surplus water over and above such as might be appropriated and used by the desert-land entrymen, but 'the water of all lakes, rivers, and *other sources of water supply* upon the public lands and not navigable" were to remain 'free for the appropriation and use of the public for irrigation, mining and manufacturing purposes.' If this language is to be given its natural meaning, and we see no reason why it should not, it effected a severance of all waters upon the public

domain, not *theretofore appropriated, from the land itself.* From that premise, it follows that a patent issued thereafter for lands in a desert-land state or territory, under any of the land laws of the United States, carried with it of its own force, no common law right to the water flowing through or bordering upon the lands conveyed.

"* * * The opinion, dealing with the question of riparian rights, said that it was within the power of any state to change the common-law rule and permit the appropriation of the flowing waters for any purpose it deemed wise. Whether a territory had the same power the court did not then decide. Two limitations of state power were suggested: first, in the absence of any specific authority from Congress, that a state could not by its legislation destroy the right of the United States as the owner of lands bordering on a stream to the continued flow—so far, at least, as might be necessary for the beneficial use of the government property; and second, that its power was limited by that of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. With these exceptions, the court, however, thought that by the acts of 1866 and 1877 'Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow,' and that 'the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, *to any system,* although in contravention to the common law rule, which permitted the appropriation of these waters for legitimate industries.' * * *

"The Supreme Court of Oregon in Hough v. Porter, 51 Ore. 318, 95 P. 732, 98 P. 1083, 102 P. 728, held that the legal effect of the language already quoted from the Desert Land Act was to dedicate to the public all interest *riparian or otherwise, in the waters of the public domain,* and to abrogate the common-law rule in respect of riparian rights as to all lands settled upon or entered after March 3, 1877. The supplemental

opinion which deals with the subject beginning at p. 382 is well reasoned, and we think reaches the right conclusion. * * *

"As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. * * * The fair construction of the provision (Act of 1877) now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved *for the use of the public under the laws of the states and territories named.* The words that the water of all sources of water supply upon the public lands and not navigable 'shall remain and be held free for the appropriation and use of the public' are not susceptible of any other construction. The only exception made is that in favor of *existing* rights; and the only rule spoken of is that of *appropriation.* It is hard to see how a more definite intention to sever the land and water could be evinced. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein. * * *

"Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, *if not before,* all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain."

The Desert Land Act provided that "all waters *upon* the public domain" (except navigable waters) were "to remain free for the appropriation and use by the public." It was not intended to be taken literally that such waters must

be upon the surface of the earth to be subject to such use. Waters of underground rivers with defined banks have always been subject to appropriation. We conclude that all water that may be used for irrigation was reserved by the Desert Land Act to be used beneficially by the public, as provided by the laws of the arid states. No interest in such waters was conveyed by a United States patent. The United States Supreme Court has always looked to the laws and decisions of the state courts to determine the extent to which the authority of the state over such water had been exercised. Howard v. Perrin, 200 U. S. 71, 50 L. Ed. 374; Snake River Etc. Co. v. Midway Irr. Co., 260 U.S. 596, 67 L. Ed. 423. The Supreme Court o fUtah has changed its theory of the law of appropriation several times, but the United States Supreme Court follows its latest decision. See the Snake River case.

After different conclusions as to the status of artesian water the Supreme Court of Utah in Riordan v. Westwood, 203 P. 2d 922, stated that until 1935 its decisions treated the water of artesian basins as percolating water and as such the ownership went to the owner of the ground where such water was located and was not considered to be subject to appropriation; but that in Glover v. Utah Oil Refining Co., 62 Utah 174, 218 P. 955, 31 A. L. R. 900, it had concluded differently and that the doctrine of percolating waters and correlative rights had no application to artesian basins such as were involved in that case; that such waters were subject to appropriation and the doctrine that "the first in time is the first in right" governed. The history of the law of artesian wells and underground waters in that state is gone into in an exhaustive opinion, with the conclusion that such water is subject to appropriation and that one who went on another's land and drilled a well for artesian water was not precluded from applying for an appropriation of such water.

Under the laws of Idaho the law of "first in time is first in right" in applying subterranean waters to a beneficial use, is approved in Hinton v. Little, 50 Ida. 371, 296 P. 582. It was held in the case of Maricopa County, Etc. Dist. v. Southwest Cotton Co., 39 Ariz. 65, 4 P. 2d 369, that under-

ground water was not subject to appropriation *under the laws of Arizona.*

In the state of California the doctrine of correlative rights is in force. The following cases are of interest, although they have no application here: Orchard v. White Ranches, (Calif. App.) 217 P. 2d 143; City of Pasadena v. City of Alhambra, —— Cal. —— 207 P. 2d. 17; Hillside Water Co. v. Los Angeles, 10 Calif. 2d 677, 76 P. 2d 681. This doctrine seems to have been established by the decisions of the courts of California, the first of which is Katz v. Walkinshaw, 141 Calif. 116, P. 663.

We hold that under the Federal law and that of New Mexico the waters described in Sec. 1 of the Act of 1931 are subject to appropriation under that Act.

Defendants attack the statute of 1931 as being vague and uncertain to the extent that it does not meet the requirements of the due process clause of the Federal and State Constitutions. It is asserted that the standard by which the public character of underground water is determined, i. e., those "having reasonably ascertainable boundaries" is not sufficiently certain to meet this test of constitutionality when applied to newly developed underground sources. Defendants admit that the south, east and west boundaries of the Roswell basin not only are ascertainable but have been ascertained. Their lands lie toward the south end of the basin, and there are hundreds of wells to the north. For all practical purposes the north boundary is located at or beyond the location of the wells furtherest north.

In the enactment of statutes reasonable precision is required. Legislative enactments may be declared void for uncertainty if their meaning is so uncertain that the court is unable, by the application of known and accepted rules of construction, to determine what the legislature intended with any reasonable degree of certainty. But absolute or mathematical certainty is not required in the framing of a statute. State v. Schaffer, 96 Ohio St. 215, 117 N. E. 220, L. R. A. 1918B 945; State v. Northwest Poultry & Egg Co., 203 Minn. 438, 281 N. W. 753.

> "The use of such terms as 'reasonable' or 'unreasonable' in defining standards of conduct or in prescribing

> charges, allowances and the like, * * * have been held not to render a statute invalid for uncertainty and indefiniteness." 50 Am. Jur. Statutes, Sec. 473.

In the case of Sproles v. Binford, 286 U. S. 374, 76 L. Ed. 1167, the Supreme Court of the United States had under consideration a Texas statute which was attacked for uncertainty because in regulating the use of highways by trucks it used the words "shortest practicable route" and other allegedly vague expressions. In holding the statute valid the Supreme Court said:

> "The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding. The use of common experience as a glossary is necessary to meet the practical demands for legislation. In this instance, to insist upon carriage by the shortest possible route, without taking the practicability of the route into consideration would be but an arbitrary requirement, and the expression of that which otherwise would necessarily be implied in order to make the provision workable, does not destroy it."

The word "reasonably" is defined "In a reasonable manner, moderately; tolerably; sufficiently." (Websters International Dict.). The legislature knew that the exact meanderings of the boundaries of any underground body of water could not be determined. The qualifying word "reasonably" was used in the sense of "sufficiently". The boundaries must be sufficiently ascertainable for the purposes of the act. Of course there is difficulty involved in determining such boundaries. But we are of the opinion that three boundaries having been established and that the other necessarily exists, that the defendants who are within the boundaries, cannot complain, even though the other could only be established by the unnecessary drilling of wells for such purpose. For all practical purposes, the boundaries have been sufficiently established by the State Engineer, and that is all that the law requires.

The Act of 1931 has been in effect for 19 years during all of which time it has been applied in the administration of underground water sources throughout New Mexico. Eight such sources are now administered by the State Engineer.

There are about one million acres of irrigated land in New Mexico and nearly one-third, or about 300,000 acres are irrigated from wells based upon water rights issued under the Act of 1931. There are about 100,000 acres irrigated from the Roswell basin, of the value of nearly $25,000,000. Titles to this property are involved, and any decision affecting them adversely would be disastrous to the economy of the state.

It would be anomalous indeed if this court, after such a history of successful application of the statute should now determine that it is void for vagueness and uncertainty. The statute is not void for the reasons stated.

It is asserted that "the operation of said law by the State Engineer has been discriminatory, arbitrary and unlawful and has operated to deny the defendants the equal protection of laws and to result in special privileges being extended to others similarly situated."

The trial court found as a fact "That the State Engineer has not discriminated against any of the parties hereto in his administration of the underground water law, either in so far as it affects the shallow water basin or the artesian basin with which these suits are concerned." This finding is supported by substantial evidence. The operation of the Act by the State Engineer denies the defendants no constitutional right.

It is said that "by said act, no method of determining the boundaries of a district is set forth and defined, and no rules relating thereto have been provided by the Legislature or by regulations of the State Engineer, and no method in the determination of such boundaries is afforded or has been afforded which provides due process of law to these defendants."

The defendants admit that the East, South and West boundaries have been determined, and the evidence is conclusive that they are within the boundaries of the Roswell Artesian basin and the overlying valley fill. For all prac-

tical purposes the boundaries of the basins have been ascertained. No specific rule for determining the boundaries is required.

It is said that the valley fill is not a reservoir or lake, and therefore is not within Sec. 1 of the Act; that "no one ever heard of a lake or reservoir with a sloping water table." One definition of a reservoir is "A place where water is collected and kept for use when wanted." (Webster). Whether the water table "slopes" we need not determine. We will assume that the law of gravitation will take care of that. We know that the valley fill is a reservoir from which billions of gallons of water are pumped to irrigate annually 45,000 acres of land, so it must be collected there; and the legislature aptly called such containers of water, reservoirs or lakes. The case of Maricopa County v. Southwest Cotton Co., 39 Ariz. 65, 4 F. 2d. 369, is not in point. It was held in that case that the laws of Arizona for the appropriation of water for irrigation had application to surface water only. And see Howard v. Perrin, supra.

There is another consideration which requires the affirmance of the trial court's decree. The decision of Yeo v. Tweedy, supra, has become a rule of property. In the nineteen years since that decision it may be assumed that many thousands of acres of the one hundred thousand irrigated with water from the Roswell Artesian basin and the valley fill have been sold to purchasers who relied on that decision as determining title to the right to use the water here involved, and the water rights to which would be injured or destroyed if Yeo v. Tweedy is overruled. Whether it stated the correct rule of law (and we are of the opinion that it did), it is now a rule of property that we will not disturb. On this question plaintiff cites the following cases, which support our conclusion: In Re Lewis' Will, 41 N. M. 522, 71 P. 2d 1032; Baca v. Chavez, 32 N. M. 210, 252 P. 987; Duncan v. Brown, 18 N. M. 579, 139 P. 140; Smith v. McDonald, 42 Calif. 484.

The parties have stipulated in this court to facts that show all lands of defendants involved here were patented after March 1877, the date of the Desert Land Act; and before the Act of 1931. We have concluded that the water

involved was reserved, on or before the date the Desert Land Act became effective, to the State of New Mexico as trustee for the public, and subject to its use by the public at any time thereafter, by authority of the state statutes, even though passed after the date of the patents to the lands of the defendants. The patents to defendants' lands carried no right to the use of water, except as to that actually applied to the reclaiming of land under the Desert Land Act, and not thereafter abandoned. All other water belonged to the State as Trustee for the public.

Other questions are raised but all are obviously without merit, or are determined by our decision on other questions.

The decree of the district court is affirmed, and

It Is So Ordered.

(S.) CHARLES R. BRICE, *Chief Justice.*

We Concur:

(S.) EUGENE D. LUJAN, J.
(S.) DANIEL K. SADLER, J.
(S.) JAMES B. McGHEE, J.
(S.) J. C. COMPTON, J.